Independent Human Rights Act Review – Call for Evidence

UK Government Collectively Agreed Response

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Overview

Introduction

1. On 13th January the Independent Human Rights Act Review launched their Call for Evidence (CfE).
2. The Ministry of Justice (MoJ) has led an exercise to collate this UK Government response.

Approach

3. The CfE asked for views on two broad themes outlined in the panel's Terms of Reference (ToR): the relationship between domestic courts and the European Court of Human Rights (ECtHR); and the impact of the Human Rights Act 1998 (HRA) on the relationship between the judiciary, the executive and the legislature.
4. The Government response is structured to present specific statements and relevant evidence relating to these two themes. The evidence selected responds to the ToR questions in the context of the impact on Government policy.
5. The Government response does not seek to set out any policy positions. The focus of the response is on the factual evidence, largely in the format of case law, and statements about its impact on Government policy.

ToR Theme 1

The relationship between domestic courts and the European Court of Human Rights (ECtHR)

Under the HRA, domestic courts and tribunals are not bound by the jurisprudence of the ECtHR, but are required by section 2 to "take into account" that jurisprudence (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

Section 2 HRA - 'Take into account'

6. In the case of *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, Lord Slynn of Hadley said (at [26]) (emphasis added):

   "*Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions [of the European Court of Human Rights] it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence."*

7. Similar statements can be found in cases such as R v Horncastle [2009] UKSC 14 (at [11]) and Manchester City Council v Pinnock [2010] UKSC 45 (at [48]). As can be seen here, therefore, the duty to 'take into account' jurisprudence of the ECtHR under section 2 is generally applied as a presumptive authority, absent special circumstances, of the ECtHR on the determination of Convention rights. Domestic courts can be seen to follow ECtHR judgments rather than simply 'tak[ing them] into account', albeit domestic rules of precedent still apply.

8. The adoption of the 'living instrument' doctrine by the ECtHR, the idea that the European Convention on Human Rights ('ECHR') should be interpreted in light of present-day conditions, coupled with the section 2 HRA obligation, can result in unpredictable outcomes where previous decisions are modified or departed from.

9. For example, there is a series of cases in which the ECtHR and domestic courts have considered the proper approach to cases concerning the removal of foreign

nationals where they require medical treatment that is not available to them in their country of origin. The UK has recently intervened, alongside a number of other States, in *Savran v. Denmark* (Application No. 57467/15). The UK intervened in this case to encourage the ECtHR to resolve questions as to the proper interpretation of its judgment in *Paposhvili v Belgium* (Application No. 41738/10), namely, whether *Paposhvili* intended to depart from, or merely clarify, *N. v UK* (Application No. 26565/05). In *N* a majority of the Grand Chamber concluded that Article 3 did not prevent State parties from removing foreign nationals who, if returned to their country of nationality, would be likely to suffer ill health, discomfort, pain and death within a few years. In *Paposhvili,* however, the ECtHR appeared to revise this decision holding (at [183]) that Article 3 prevented the removal of persons where:

"substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense sufferance or to a significant reduction in life expectation".

10. It also placed a number of procedural requirements upon the removing State to seek assurances about the availability and accessibility of medical treatment on removal. However, the ECtHR pointed out (at [183]) *"that these situations correspond to a high threshold for the application of article 3".*

11. In the case of *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, the Supreme Court considered whether, as a result of *Paposhvili*, they should revisit their judgment in *N v Secretary of State for the Home Department* [2005] UKHL 31. The Supreme Court noted (at [34]) that: "[*o*]*ur refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances."* They concluded however *"in the light of the decision in the Paposhvili case, it is from the decision of the House of Lords in the N case that we should today depart."*

12. As a result, and especially in light of the procedural requirements, more cases are now granted discretionary leave under Article 3 on medical grounds, as it can be problematic to provide sufficient evidence regarding accessibility of treatment in the country of removal. The UK therefore considered it important to intervene and, in its intervention, has argued in *Savran* that *Paposhvili* was intended to clarify, not depart from, the principles in *N.*

13. By way of further example, there have been a number of cases where the domestic courts and ECtHR have considered the applicable test for justifying discriminatory treatment otherwise contrary to Article 14 in the context of welfare benefits. The Supreme Court recently sought to settle the issue in *R (DA and others) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 where a majority held, after taking into account the relevant ECtHR judgments, that the appropriate test when considering the justification for what would otherwise be a discriminatory effect of a rule was whether it is 'manifestly without reasonable foundation'. However, doubt has now been cast upon the decision of the Supreme Court by the decision of ECtHR in *JD & A v UK* (Application Nos. 32949/17 and 34614/17) where the ECtHR held that

'very weighty reasons' were required to justify the indirectly discriminatory effects of the application of the 'spare room subsidy' to persons with disabilities and women. It is not yet clear how the domestic courts will 'take into account' this decision in accordance with their duty under section 2 in future cases.

14. There are also cases where it appears that the courts go further than required by section 2 and take ECtHR jurisprudence into account when not strictly required. For example, in *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 Lord Reed held (at [89]) (emphasis added):

"There is an analogy between the latter principle and the principle of proportionality, as developed in the case law of the European Court of Human Rights. These proceedings are not based on the Human Rights Act 1998, since the appellant is not a "victim" within the meaning of section 7(1) of that Act. Nevertheless, the case law of the Strasbourg court concerning the right of access to justice is relevant to the development of the common law. It will be considered in the context of the case based on EU law, on which it also has a bearing. To anticipate that discussion, however, it is clear that the ability of litigants to pay a fee is not determinative of its proportionality under the Convention. That conclusion supports the view, already arrived at by the common law, that even an interference with access to the courts which is not insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective."

'Mirror Principle'

15. Relevant to the discussion of section 2 is the 'mirror principle'. As the Panel will be aware, in the case of *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 Lord Bingham stated (at [20]) that (emphasis added):

"In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: … This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

16. The extent to which domestic courts should consider themselves effectively limited by ECtHR jurisprudence has been the subject of considerable discussion in the case law. As Lord Kerr observed in *Ambrose v Harris* [2011] UKSC 43 (at [126]): *"[…] some judges in this country have evinced what might be described as an Ullah-type*

reticence. On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone."

17. However some judges have also emphasised that the interpretation of Convention rights under the HRA is ultimately a matter for the domestic courts. In the Court of Appeal decision in *Runa Begum v Tower Hamlets LBC* [2002] EWCA Civ 239, for example, Laws LJ made the following remarks (at [17]):

    "[…] the court's task under the HRA […] is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as HRA s.2 enjoins us to do."

18. Similarly, in Re *McKerr's Application for Judicial Review* [2004] UKHL 12, Lord Hoffman stated (at [65]) that HRA Convention rights "*are domestic rights, not international rights. Their source is the statute, not the Convention. … And their meaning and application is a matter for the domestic courts, not the court in Strasbourg."*

19. In cases following *Ullah*, the courts have held that the HRA requires them to apply their own understanding of Convention rights where there is no ECtHR jurisprudence addressing the issue in question. Lord Kerr summarised his view of the case law in Commissioner *of Police of the Metropolis v DSD* [2018] UKSC 11 (at [75] – [78]) (emphasis added):

    "The difficulty with the argument [that where Strasbourg has not yet spoken, national courts should not venture forth] is that it fails to address the circumstance that the courts of this country, constituted as they are as public authorities, must give effect to (or refuse to give effect to) Convention rights as a matter of domestic law. The HRA introduced to the law of the United Kingdom the European Convention on Human Rights and Fundamental Freedoms by making the Convention part of national law so that the rights became domestic rights. Because the rights are domestic, they must be given effect according to the correct interpretation of the domestic statute. As Lord Hoffmann said In re G (Adoption: Unmarried Couple) [2008] UKHL 38; [2009] AC 173, para 34 "[the courts'] first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg".

    The so-called "mirror principle" ... is often attributed to Lord Bingham's statement in Ullah at para 20 … As explained in para 232 of R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355, Lord Bingham was careful to refer to the interpretation of the Convention (as opposed to the interpretation of HRA). Despite this, his opinion in that case has been used in a number of subsequent judgments to support the proposition that the content of domestic rights under HRA should not, as a matter of principle, differ from that pronounced by Strasbourg. Indeed, his judgment has been construed as indicating that, unless ECtHR has given clear guidance on the nature and content of a particular Convention right, the national courts of the United Kingdom should refrain

from recognising the substance of a claimed entitlement under ECHR - see, for instance, Al-Skeini, Smith and Ambrose [...]

In more recent cases, a departure from the mirror principle can be detected. Thus, in Rabone v Pennine Care NHS Foundation Trust (INQUEST intervening) [2012] UKSC 2; [2012] 2 AC 72 it was held that there was a positive obligation to protect the life of a mentally ill young woman who had been admitted to hospital informally because of serious attempts to take her own life. This decision was reached notwithstanding the fact that there was no authority from ECtHR to that effect. In Surrey County Council v P (Equality and Human Rights Commission intervening) [2014] UKSC 19; [2014] AC 896, para 62 Lord Neuberger said that where there was no Strasbourg authority which dealt precisely with the issues before this court, this court could rely on principles expressed by ECtHR, even if only indirectly relevant, and apply them to the cases which it had to decide. And in Moohan v Lord Advocate (Advocate General for Scotland intervening) [2014] UKSC 67; [2015] AC 901 Lord Wilson suggested that there had been a "retreat" from the Ullah principle which had led the court to "substantially" modify it. At para 105 he said: "… where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right …"

This seems to me to be inescapably correct. Reticence by the courts of the UK to decide whether a Convention right has been violated would be an abnegation of our statutory obligation under section 6 of HRA. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right."

Margin of Appreciation

20. Further the 'mirror principle' has been held not to apply to areas where the ECtHR grants the UK a 'margin of appreciation'. The margin of appreciation is a term used to refer to the 'room for manoeuvre' which the ECtHR affords to State parties in fulfilling their obligations under the ECHR. The ECtHR will often grant a wide margin of appreciation in cases where the ECtHR recognises that the national authorities are better placed to carry out any balancing exercise under the ECHR. For example, in *James v UK* (Application No. 8793/79) the ECtHR explained (at [46]):

    "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (see, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation."

21. The ECtHR will also grant a wider margin of appreciation where there is no consensus through-out the State parties to the ECHR and where particularly sensitive issues of social or moral policy are under consideration (see, for example, *Vo v France*

(Application No. 53924/00) concerning the definition of the beginning of life and the recognition of this approach by Lady Hale in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 at [22].)

22. In relation to the margin of appreciation, the domestic courts have adopted an approach that allows them to find that a matter would fall within the UK's margin of appreciation in the ECtHR, and yet that Convention rights have been violated. These cases raise the question of 'judicial deference' and whether the court is the appropriate decision maker in these often sensitive areas of public policy, as opposed to the Executive and Parliament. 'Judicial deference', which pre-dates the HRA but has particular relevance in this context, describes the process by which the courts may restrict the extent of their judgment on particular matters, recognising that in certain circumstances it is more properly for the democratically elected legislature, or in some cases executive as the expert decision maker.

23. By way of example, in *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38 the House of Lords held (at [36] – [37]) (emphasis added):

"Other reasons for following Strasbourg are ordinary respect for the decision of a foreign court on the same point and the general desirability of a uniform interpretation of the Convention in all Member States. <u>But none of these considerations can apply in a case in which Strasbourg has deliberately declined to lay down an interpretation for all Member States, as it does when it says that the question is within the margin of appreciation.</u>

<u>In such a case, it [is] for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom.</u> The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch."

24. Equally*, in R (oao Nicklinson) v Ministry of Justice* [2014] UKSC 38 the Supreme Court considered the issue, stating (at [70] and [148b)] *per* Lord Neuberger and [163]-[164] *per* Lord Mance) (emphasis added):

"So far as the law on assisted suicide is concerned, the conclusion reached by the Strasbourg court is of a different nature. <u>As explained above, the court has held that there is a wide margin of appreciation accorded to each state in this area, and that it is for each state to decide for itself how to accommodate the article 8 rights of those who wish and need to be assisted to kill themselves</u> with the competing interests of the prevention of crime and the protection of others – see Pretty v UK , para 74, Haas, para 55 and Koch, paras 70 and 71. In those circumstances, it does not appear to me that the dictum quoted above from Ullah is in point. (For this reason, this is not the occasion to address the question whether, and if so how far, the principle enunciated by Lord Bingham in Ullah, para 20, should be modified or reconsidered.) <u>In a case such as this, the national courts therefore must decide the issue for themselves, with relatively unconstraining guidance from the Strasbourg court, albeit bearing in mind the constitutional proprieties and such guidance from the Strasbourg jurisprudence, and indeed our own jurisprudence, as seems appropriate.</u>

[…]

Given that the Strasbourg court has decided that it is for the member states to decide whether their own law on assisted suicide infringes article 8, I consider, in common with other members of the Court, that domestic courts have the constitutional competence to decide the issue whether section 2 infringes article 8.

[…]

[T]he fact that Parliament has legislated a blanket ban is not the end of the matter as far as United Kingdom courts are concerned. Under the Human Rights Act 1998, it is the courts' role to consider United Kingdom legislation in the light of the Convention rights scheduled to that Act. Where a "considerable" margin of appreciation exists at the international level, both the legislature and the judiciary have a potential role in assessing whether the law is at the domestic level compatible with such rights. That means considering whether a blanket prohibition is in accordance with law, in the sense that it not only meets a legitimate aim, but does so in a way which is necessary and proportionate. The legislator's choice is not necessarily the end of the matter … At this point, however, questions of institutional competence arise at the domestic level."

25. Further, in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 Lord Mance stated (at [54]) (emphasis added):

"At the domestic level, however, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: … However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis: … But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role."

26. Similarly, in *Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48, Lady Hale noted (at [34]):

"Strictly speaking, the margin of appreciation has no application in domestic law. Nevertheless, when considering whether a measure does fall within the margin, it is necessary to consider what test would be applied in Strasbourg - that is why the "manifestly without reasonable foundation" test has generally been applied domestically in benefit cases. In cases which do fall within the margin which Strasbourg will allow to member states, the domestic courts will then have to consider which among the domestic institutions is most competent and appropriate to strike the necessary balance between the individual and the public interest. In a discrimination case such as In re G, it may be the courts. In other cases, it may be the Government or Parliament."

27. However, the majority of the Supreme Court held that the failure to pay bereavement benefits to persons who were not married breached Article 14, departing from ECtHR authority. Lord Hodge, dissenting, said (at [64]): *"I am not persuaded that this court*

has grounds for departing from this consistent line of authority from the ECtHR which the Grand Chamber has recently endorsed in Burden and Yiğit. It provides a clear answer to a complaint based on article 14 taken with A1P1. There is no suggestion that Strasbourg jurisprudence is evolving on this issue in the context with which this appeal is concerned, namely the entitlement of a surviving partner to state benefits arising out of the deceased's contributions." As a result, there have been a number of other Article 14 discrimination cases brought in relation to bereavement benefits, such as *Jackson and Others v SSWP* [2020] EWHC 183.

Judicial dialogue

28. The concept of 'judicial dialogue' is also relevant to section 2. This occurs when the domestic courts consider the ECtHR jurisprudence on an issue, and the domestic court analysis is in turn considered by the ECtHR. It can be seen in cases such as *R v Horncastle,* cited above, where the Supreme Court held (at [11]):

    "*The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case."*

29. Linked to judicial dialogue is the principle of subsidiarity from the ECtHR which provides that the domestic authorities of the States parties are primarily responsible for safeguarding Convention rights. Indeed, the ECtHR regards itself as providing a secondary, or supervisory, layer of protection. For example in *A & Others v UK* (Application No. 3455/05) (at [154]) the Grand Chamber of the ECtHR held (emphasis added): "*[t]he Court is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that national courts should initially have the opportunity to determine the questions of compatibility of domestic law* […] *the Court* […] *should have the benefit of the views of national courts, as being in direct and continuous contact with the forces of their countries*". (See also *MGN Ltd v UK*, Application No. 39401/04 at [150] and the Brussels Declaration 2015).

30. Constructive Judicial dialogue is exemplified in the exchanges between the Supreme Court and the ECtHR in cases such as *Horncastle v UK* (Application No. 4184/10) and *Al-Khawaja and Tahery v UK* (Applications No. 26766/05 and 22228/06). The dialogue concerned the admissibility of hearsay evidence that is the sole and decisive evidence in criminal trials. In *Al-Khawaja and Tahery*, the ECtHR had ruled that convictions based solely or decisively on hearsay evidence breached the right to a fair trial under Article 6. The ECtHR's judgment in *Al-Khawaja and Tahery* was examined by the UK Supreme Court in *R v. Horncastle,* cited above, where the Supreme Court declined to follow the decision of the ECtHR pending further

clarification by the Grand Chamber. In the subsequent judgment the Grand Chamber essentially agreed with UK domestic courts that a conviction based "solely or decisively" on the statement of an absent witness does not automatically result in a breach of Article 6. Judicial dialogue, therefore, helped afford the ECtHR the opportunity to 'think again' as the UK position was better understood and could be further justified in international proceedings.

31. By way of further example, in *R v McLoughlin* [2014] EWCA Crim 188 the government successfully argued that the domestic courts should not follow the decision in *Vinter & Others v UK* (Application Nos. 66069/09, 130/10, 3896/10). The matter then went back to the ECtHR in *Hutchinson v UK* (Application No. 57592/08) where the Grand Chamber held that the regime for considering the circumstances for release of prisoners serving a 'whole life sentence' did not breach the Applicant's Article 3 rights, distinguishing their decision in *Vinter*. In *Hutchinson*, the ECtHR quoted the Court of Appeal's judgment in *McLoughlin* where they noted that *Vinter* had misconstrued relevant legislative provision and failed to recognise the strength of the section 3 obligation. The Grand Chamber in *Hutchinson* noted (at [56]): *In this respect too, the role of the Human Rights Act is of importance, section 3 of the Act requiring that legislation be interpreted and applied by all public bodies in a Convention-compliant way*". This is another example of robust judicial dialogue.

32. Another example of ongoing dialogue is in relation to the case of *JD & A v UK* cited above. Here the ECtHR cast doubt on the applicability of the 'manifestly without reasonable foundation' test in the sphere of welfare benefits. The UK sought to refer the case to the Grand Chamber, which may have enabled greater 'judicial dialogue' and important clarity on the applicable test, but this was refused. The process of judicial dialogue is continuing however with the issue being reconsidered by the Supreme Court in *R (SC and others) v Secretary of State for Work and Pensions* (UKSC 2019/0135 – judgment pending) and in *DA & RA v UK* (Application No.46692/19). It remains to be seen where this judicial dialogue will come out and the extent to which the ECtHR will afford the UK a margin of appreciation in this context.

ToR Theme 2

The impact of the HRA on the relationship between the judiciary, the executive and the legislature

The judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review should consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

   i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

   ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

   iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

The HRA and the role of the judiciary

i.) Pre HRA

34. Prior to the HRA, as the Panel will be aware, the court in judicial review cases, when considering challenges to actions of public authorities, would apply the test of 'rationality' or '*Wednesbury* unreasonableness'. As Lord Diplock explained in *Council of Civil Service Unions & others v Minister for the Civil Service* [1985] AC 374 (at [410]), in relation to the judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223: "*It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

35. This was compared to the ECtHR principle of proportionality in the case of *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696, where Lord Ackner (at [762]-[763]) described proportionality as *"a different and severer test"* holding: "*The European test of "whether the 'interference' complained of corresponds to a 'pressing social need"' must ultimately result in the question "Is the*

particular decision acceptable?" and this must involve a review of the merits of the decision…".

36. Similarly, in *R. v Ministry of Defence Ex p. Smith* [1996] Q.B. 517 the Court of Appeal discussed the appropriate constitutional balance given the Convention was not part of domestic law stating, (at [540] – [541]) (emphasis added):

    "I approach the case, therefore, on the conventional Wednesbury basis adapted to a human rights context and ask: can the Secretary of State show an important competing public interest which he could reasonably judge sufficient to justify the restriction? The primary judgment is for him. Only if his purported justification outrageously defies logic or accepted moral standards can the court, exercising its secondary judgment, properly strike it down.

    …

    If the Convention for the Protection of Human Rights and Fundamental Freedoms were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to its benefits, then clearly the primary judgment (subject only to a limited "margin of appreciation") would be for us and not others: the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgment, this court is bound, even though adjudicating in a human rights context, to act with some reticence. Our approach must reflect, not overlook, where responsibility ultimately lies for the defence of the realm, and recognise too that Parliament is exercising a continuing supervision over this area of prerogative power."

ii.) Post HRA

37. After the HRA, in cases concerning Convention rights, the courts have adopted the ECtHR approach of 'proportionality', see, for example *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 where Lord Steyn (at [27]) underlined the 'material difference' between the Convention principle of proportionality and *Wednesbury* unreasonableness on the basis that proportionality permits the court to *"assess the balance struck by the decision-maker"*.

38. In the case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11 the House of Lords confirmed (at [11]) that (emphasis added):

    "… the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it."

39. In this case the House of Lords confirmed that proportionality meant asking whether the policy in question pursues a sufficiently important objective; the rule or decision under review is rationally connected to that objective, the means adopted are no

more than necessary to meet that objective and the measure achieves a fair balance between the interests of the individuals in question and wider society.

40. There is an ongoing judicial discussion concerning the proper approach of the appellate courts to the question of proportionality. For example, the Supreme Court in cases such as *Nicklinson* and *DA,* both cited above, considered afresh the question of proportionality in the proceedings before them. However, in some recent cases the Court of Appeal has been seen, not to re-perform the proportionality assessment, but rather to assess whether the judge at first instance was justified in their assessment, see for example the case of *R (Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Department of Environment, Food & Rural Affairs* [2020] EWCA Civ 649. This approach raises questions about whether the decision of the first instance court is being granted more deference than that of the initial decision maker.

41. In some contexts, Parliament has sought to guide the courts in relation to this proportionality balance. See, for example, the Immigration Act 2014, which requires the court to have regard to certain factors when deciding whether a decision is a breach of Article 8. The factors were based on ECtHR and domestic caselaw and were intended to ensure greater consistency and give greater weight to the views of Parliament.

42. The adoption of proportionality review in claims concerning Convention rights has also potentially had wider implications for judicial review generally, with the courts discussing whether proportionality should be adopted as the standard of review in other cases. For example, in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473 the Court of Appeal noted (at [34]) (emphasis added):

    "Support for the recognition of proportionality as part of English domestic law in cases which do not involve Community Law or the ECHR is to be found in para 51 of the speech of Lord Slynn in R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 WLR 1389 , 1406; and in the speech of Lord Cooke at para 32 of Daly . See also De Smith, Woolf and Jowell Judicial Review of Administrative Action 5th edition page 606. It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the Wednesbury principle and proportionality in separate compartments is unnecessary and confusing. The criteria of proportionality are more precise and sophisticated (see Lord Steyn at para 27 of Daly). It is true that sometimes proportionality may require the reviewing court to assess for itself the balance that has been struck by the decision-maker, and that may produce a different result from one that would be arrived at on an application of the Wednesbury test. But the strictness of the Wednesbury test has been relaxed in recent years even in areas which have nothing to do with fundamental rights: see the discussion in Craig Administrative Law 4th edition pp 582–584. The Wednesbury test is moving closer to proportionality, and in some cases it is not possible to see any daylight between the two tests: see Lord Hoffmann "A Sense of Proportion" (John Maurice Kelly Memorial Lecture 1996 p 13). Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the Wednesbury test."

43. Similarly, in *Kennedy v Charity Commission* [2014] UKSC 20 Lord Mance stated (at

[51]) (emphasis added):

"[…] The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends upon the context. The change in this respect was heralded by Lord Bridge of Harwich said in R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514 , 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, "the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines".

44. See also the Supreme Court in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 (at [133]) (emphasis added):

"The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest – see R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532 , para 27, per Lord Steyn. However, it is important to emphasise that it is no part of the appellants' case that the court would thereby displace the relevant member of the executive as the primary decision-maker – as to which see per Lord Sumption and Lord Reed in Bank Mellat (No 2) at paras 21 and 71 respectively. Furthermore, as the passages cited by Lord Kerr from Kennedy v Charity Commission (Secretary of State for Justice intervening) [2014] UKSC 20, [2015] AC 455, paras 51 and 54, and Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening) [2015] UKSC 19, [2015] 1 WLR 1591, paras 96, 113 and 115 show, the domestic law may already be moving away to some extent from the irrationality test in some cases."

45. However, in *Browne v The Parole Board of England & Wales* [2018] EWCA Civ 2024 Lord Justice Coulson noted (at [58]) (emphasis added):

"Accordingly, these authorities spell out the simple proposition that, for now at any rate, the common law test for judicial review is based on the underlying principle of rationality. Whilst there is some support for adopting a proportionality test in particular cases concerned with fundamental rights (see for example Kennedy), there is a recognition that a more widespread change would require a major review by the Supreme Court and the necessary overruling of Brind and Smith."

46. The HRA in this regard has also potentially had other wider impacts. For example, the courts have indicated, in some cases, that the HRA has impacted the relationship between legislative supremacy and fundamental rights. For instance, in *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin Lord Justice Laws (at [64]) (cited in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5) stated (at [64]):

"This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it

preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand. Nothing is plainer than that this benign development involves, as I have said, the recognition of the ECA as a constitutional statute."

Section 3 interpretation

47. Section 3 has also had a significant impact on the role of the courts, who have adopted a broad approach to this interpretative duty. The application of section 3 in various cases has included the courts holding that:

    a. the phrase "*so far as it is possible"* can be interpreted as meaning "*unless it is plainly impossible"* (*R v A (No 2)* [2001] UKHL 25 at [44]);

    b. section 3 can be used even where there is no ambiguity in the legislation (see, for example, *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [29);

    c. even if the legislation is very clear, section 3 can be used to require that the legislation be given a different meaning (see, for example, *Ghaidan* at [29]);

    d. section 3 can be used to adopt an interpretation of legislation which *"linguistically may appear strained"*, and the courts may "read in" additional words to the legislation or "read down" so as to apply a narrow interpretation of the legislation and render it compatible with Convention rights (see, for example, *R v A (No 2)* at [44] and *Ghaidan* at [67]).

48. As stated by Lord Nicholls in *Ghaidan* (at [30] and [32]) (emphasis added):

    "[T]he interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

    …

    From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of

primary and secondary legislation."

49. Likewise, in *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43 Lord Bingham noted (at [28]) (emphasis added):

"The interpretative obligation of the courts under section 3 of the 1998 Act was the subject of illuminating discussion in Ghaidan … The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger in that case (with which Lady Hale agreed) sdo not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention−compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention−compliant interpretation is not possible, … All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "So far as it is possible to do so".

50. An early example of the impact of section 3 is *R v A (No 2)*, cited above, where the House of Lords held that the tightly prescribed limits on the admissibility of evidence and questioning about a rape complainant's sexual history in the YJCEA should be read as subject to the implied provision that such evidence or questioning will not be inadmissible if so relevant to the issue of consent that to exclude it would endanger the fairness of the trial. A further example is *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 where the House of Lords interpreted the Immigration and Asylum Act 1999 to reflect the expansive approach favoured by the ECtHR in relation to Article 8 family life considerations, when the plain wording of the legislation was restrictive.

51. More recently, in *Michael O'Donnell v Department for Communities* [2020] NICA 36 the Court of Appeal adopted a section 3 interpretation that departed from the unambiguous wording of the Pensions Act (Northern Ireland) 2015. The appellant had been denied Bereavement Support Payment on the basis that the contribution condition in section 29(1)(d) of the Act had not been met. As set out in section 30(1), the contribution condition requires that for at least one tax year during the deceased's working life he or she is "actually paid Class 1 or Class 2 national insurance contributions". The Court of Appeal relied on section 3 to read a new provision into the Act in the following terms: *"For the purposes of section 29(1)(d) the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability."*

52. The courts have, however, recognised that there are proper limits to section 3. For example, Lord Woolf CJ noted in *Poplar Housing and Regeneration Community Association Ltd v Donogue* [2001] EWCA Civ 595 (at [75]), that section 3 does not entitle the court to legislate; "*its task is still one of interpretation*". Similarly, Lord Hope in *R v A (No 2)*, cited above, said (at [108]) (emphasis added):

"The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators."

53. See also *Ghaidan v Godin-Mendoza*, cited above (at [33]):

"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

54. Further, the courts have recognised that Parliament has retained the right to enact legislation which is not Convention compliant (see, for example, *R v Holding* [2006] 1 W.L.R. 1040 at [47]).

55. There is no guidance in section 3 as to how it should be used and accordingly the courts' approaches have varied. As noted above, these approaches have included 'reading in' additional words, or 'reading down' language so as to apply a narrow interpretation of the statutory provision. For example, in *R (GC) v Commissioner of the Police of the Metropolis* [2011] UKSC 21, section 3 was used to read down legislation which provided that fingerprints and DNA samples *"may be retained after they have fulfilled the purposes for which they were taken"* to include a caveat that they could not be retained indefinitely. In other cases the courts have stated that they are using section 3 to clarify the meaning of a provision without altering the ordinary meaning of the word used.

56. How this task should be approached has also been the subject of differing judicial views. For example, in *R v Lambeth* [2001] UKHL 37 Lord Hope argued (at [80]):

"… that great care must be taken, in cases where a different meaning has to be given to the legislation from the ordinary meaning of the words used by the legislator, to identify precisely the word or phrase which, if given its ordinary meaning, would otherwise be incompatible. Just as much care must then be taken to say how the word or phrase is to be construed if it is to be made compatible. The justification for this approach to the use of section 3(1) is to be found in the nature of legislation itself. Its primary characteristic, for present purposes, is its ability to achieve certainty by the use of clear and precise language. It provides a set of rules by which, according to the ordinary meaning of the words used, the conduct of affairs may be regulated. So far as possible judges should seek to achieve the same attention to detail in their use of language to express the effect of applying section 3(1) as the parliamentary draftsman would have done if he had been amending the statute. It

ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment. If this cannot be done without doing such violence to the statute as to make it unintelligible or unworkable, the use of this technique will not be possible. It will then be necessary to leave it to Parliament to amend the statute and to resort instead to the making of a declaration of incompatibility."

57. Whereas Lord Rodger of Earlsferry in *Ghaidan,* cited above, considered that a different approach was appropriate (at [123]-[124]) (emphasis added):

"Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. [...] Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because section 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf R v Lambert [2002] 2 AC 545, 585, para 80, per Lord Hope of Craighead . It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it."

58. There is also no formal record of when legislation has been read in a particular way in accordance with the section 3 obligation.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

Incompatible subordinate legislation

59. Section 4 HRA provides that a declaration of incompatibly can only be made against subordinate legislation where it is made in the exercise of a power conferred by primary legislation and the primary legislation concerned prevents the removal of the incompatibly. There has been judicial debate as to what the court should do, in accordance with their obligations under section 6 HRA to act compatibly with Convention rights, when faced with subordinate legislation which they consider is incompatible and a declaration of incompatibility is not available. In *Re G*, cited above, Baroness Hale held (at [116]):

    "The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so."

60. A similar approach was adopted by the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

61. However, in the case of *SSWP v Jayson Carmichael and Sefton Council* [2018] EWCA Civ 548 the Court of Appeal held at ([45]) that it would cross the 'constitutional boundary' to disapply regulation B13 of the Housing Benefit Regulations 2006 because section 8(1) HRA provides that a court "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate" and "the existing powers of courts and tribunals do not include the rewriting of primary or secondary legislation in order to render it compatible with Convention rights". This judgment was reconsidered, however, in the case of *RR* v SSWP [2019] UKSC 52. In this case Government submitted that rectifying the incompatibility would require rewriting the regulation which could be done in a variety of ways and that it was constitutionally inappropriate, usurping the role of the legislator, for the tribunal to redesign the legislative scheme so as to render it compatible with Convention rights. However, the Supreme Court disagreed (at [28]) noting that the HRA *"draws a clear and careful distinction between primary and subordinate legislation".* They held (at [29]):

    "The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. However, a number of applicants had not in fact experienced a reduction in their housing benefit as the difference had been made up by discretionary housing payments. In response to this the Supreme Court held (at [34]): "It is for the local authority to consider whether there are any steps which they can take to recover any DHPs and if there are whether they wish to take them."

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

Extra-Territorial Jurisdiction (ETJ) under the ECHR

62. Article 1 of the ECHR provides that contracting states shall secure to 'everyone within their jurisdiction' their rights and freedoms as set out in the Convention. The precise scope of 'jurisdiction' under this Article is not defined in the ECHR (or the HRA), leaving it to be determined by the courts.

63. The issue of extra-territorial jurisdiction has been subject to complex legal debate and continues to be addressed and developed through ECtHR jurisprudence. The ECtHR has maintained, in line with submissions made by the UK, that jurisdiction under Article 1 ECHR is primarily territorial, and that extraterritorial jurisdiction is exceptional and fact-sensitive, see, for example, *Bankovic & Others v Belgium & Others* (2001) 44 EHRR SE5 (at [61], [67], and [71]).

64. In the Grand Chamber case of *Al-Skeini v UK* (2011) 53 EHRR 18 the Government argued (see [111]-[112]) that a State would not be held to exercise Article 1 jurisdiction over an overseas territory merely by virtue of exercising effective control there and that since Iraq fell outside the legal space of the Convention, the "effective control of an area" exceptional basis of jurisdiction could not apply. In any event, the UK did not have "effective control" over any part of Iraq during the relevant time. However, the ECtHR rejected these submissions. They summarised (at [131]-[132], [141])) the following exceptional circumstances in which the ECHR may apply extraterritorially: (a) where through "state authority and control" a jurisdictional link is established, such as acts of diplomatic and consular agents who are lawfully present on foreign territory and exert authority and control over others, or where a State exercising all or some of the public powers normally exercised by another State's Government with the consent, invitation or acquiescence of that Government; and (b) where the State exercises effective control over an area. However, States are not responsible for acts that are attributable to an international organisation, see, for example, *Al-Dulimi and Montana Management Inc. v Switzerland* (Application no. 5809/08).

65. In the recent Grand Chamber case of *Hanan v Germany* (Application No. 4871/16), the UK intervened to argue that the extraterritorial use of lethal or potentially lethal force is not, on its own, sufficient to bring a case within Article 1 and that the UN Security council exercised ultimate authority and control (see [123]-[128]). A majority of the Grand Chamber, however, held that the applicant's two sons, who were killed by a German airstrike in Afghanistan, were 'within the jurisdiction' of Germany on the basis that there were "special features" giving rise to a jurisdictional link – namely that Germany was required under domestic and international law to carry out an investigation and had exclusive jurisdiction over the incident. In this judgment the majority also 'decoupled' the procedural obligation to investigate from the substantive obligation. The Court emphasised that it did not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act fell within Germany's jurisdiction or that the act was attributable to it. Accordingly, the scope of the judgment is limited to the investigative acts and omissions attributable to Germany.

66. The ECtHR jurisprudence on jurisdiction has evolved over time, and continues to evolve, which can lead to uncertainty as to its application.

ETJ under the HRA - UK courts

67. Schedule 1 to the HRA does not contain Article 1 of the ECHR nor any express provision about jurisdiction. The UK courts have found that the territorial scope of the rights and obligations under the HRA mirrors that of the ECHR. For example, in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, Lord Nicholls of Birkenhead argued (at [34]):

    "[…] Thus, and this is the important point for present purposes, the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg. Accordingly, in order to identify the territorial scope of a 'Convention right' in sections 6 and 7 it is necessary to turn to Strasbourg and consider what, under the Convention, is the territorial scope of the relevant Convention right."

68. This approach was confirmed by the House of Lords in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26. For example, Lord Rodger of Earlsferry referring to *Quark Fishing* states (at [58]-[59])*:*

    "Lord Nicholls confirms that, in interpreting the rights in the Schedule, courts must take account of the territorial scope of the relevant right under the Convention. In the present case, that means having regard to those exceptional situations where article 2 would apply outside the territory of the United Kingdom. In other words, on a fair interpretation, article 2 in the Schedule to the Act must be read as applying wherever the United Kingdom has jurisdiction in terms of article 1 of the Convention. The corollary is that section 6 must also be interpreted as applying in the same circumstances. For these reasons, section 6 should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention, but outside the territory of the United Kingdom."

69. However, he went on to note (at [67]) *"the problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice".*

70. As a result of this approach, the domestic courts have the same jurisdiction to consider cases under the HRA as could be brought before the ECtHR, ensuring an effective remedy (as required by Article 13). As noted by Baroness Hale, in *Al-Skeini,* cited above, at ([90]):

    "In particular, it has many times been said that the object of the Human Rights Act was to give people who would be entitled to a remedy against the United Kingdom in the European Court of Human Rights in Strasbourg a remedy against the relevant public authority in the courts of this country. The United Kingdom now accepts that it

would be answerable in Strasbourg for the conduct of the British army while Mr Mousa was detained in a British detention unit in Basra. It would be consistent with the purpose of the Act to give his father a remedy against the army in the courts of this country."

71. This approach has resulted in decisions such as *Smith & Ors v Ministry of Defence* [2013] UKSC 14, for example, where the Supreme Court, following *Al-Skeini v UK* held (at [45] and [52]) that the ECHR jurisdiction of the UK extended to securing the protection of the right to life under Article 2 to members of the armed forces when serving outside its territory.

72. Further, ensuring the same territorial application means that the domestic courts can consider a case first, including using domestic closed material procedures, if appropriate, with the ECtHR able to consider the open judgment in any subsequent proceedings, enabling such claims to be fully heard whilst protecting national security. If it was not possible to bring a claim before the domestic courts, then applicants may apply directly to the ECtHR. In these circumstances, the ECtHR would not have the assistance of an open judgment and may not be able to evaluate the case properly without access to sensitive material, which would likely present difficulties given the limits on the use of such material before the ECtHR.

73. However, this extension of the ECHR, and with it the HRA, has impacted military operations overseas. To take one example of detention and Article 5. The Grand Chamber of the ECtHR in *Al-Jeddar v UK* (Application No. 27021/08) in 2011 found that military detention in the course of an armed conflict outside the national territory of the Convention state contravened Article 5 where it could not be brought within one of the 6 permitted bases for detention in Article 5(1).

74. However, in *Hassan v UK* (Application No. 29750/09) in 2014 the Grand Chamber of the ECtHR, whilst rejecting the UK's argument that during the active hostilities phase of an international armed conflict, the conduct of the State party will be subject to the requirements of international humanitarian law and not the ECHR, held that international humanitarian law was relevant to the interpretation of the Convention and Article 5 should be interpreted so as to accommodate it as the *lex specialis*, which provides the relevant safeguards against abuse. This case concerned an international armed conflict and not a non-international armed conflict. Further, in the recent decision in *Georgia v Russia II* (Application No. 38263/08), a majority of the ECtHR held that "military operations" during "the active phase of hostilities" in an international armed conflict are beyond the 'jurisdiction' of the State for the purposes of the substantive obligations under Article 2, and hence the purview of the ECHR. However, jurisdiction could still be established for the purposes of the procedural obligation under Article 2 and for the substantive rights under Articles 3 and 5 for those detained during that period.

75. In 2017, in *Mohammed & Others v Ministry of Defence* [2017] UKSC 1; [2017] UKSC 2, the Supreme Court followed *Hassan* and extended its principle - that international humanitarian law can modify the Convention rights - to non-international armed conflicts and pursuant to a UN Security Council Resolution. The Supreme Court held that, despite the absence of any ground for detention in Article 5, there was power to detain under UNSCRs in a non-international armed conflict in excess of 96 hours where necessary "for imperative reasons of security". This is a further example of

dialogue with the ECtHR and will likely continue, and it remains to be seen whether the ECtHR court will follow the Supreme Court's reasoning extending the principles of *Hassan* to non-international armed conflicts.

Derogation

76. Relevant to the impact of Article 5 on military operations overseas and ETJ more broadly is the potential issue of derogation from Article 5, and other Articles, by virtue of Article 15 ECHR. In 2016 the Government issued a written ministerial statement that: *"before embarking on significant future military operations, this government intends derogating from the European Convention on Human Rights, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention.".* Further, in the Overseas Operations (Service Personnel and Veterans) Bill, presently going through Parliament, clause 12 of the Bill would introduce a statutory duty, in relation to any overseas operations that the Secretary of State considers are or would be significant, to keep under consideration whether it would be appropriate for the UK to make a derogation under Article 15(1) of the Convention.

Indirect extra-territorial effect

77. There is also a line of cases concerning so-called 'indirect extra-territorial' effect. State parties are under an obligation to prevent extraterritorial violations of the Convention rights in certain circumstances by not removing persons where there are substantial grounds for believing that they would face a real risk of being subjected to torture or serious mistreatment under Article 3. See, for example, *Soering v UK* (Application No. 14038/88) and the majority decision of the Grand Chamber in *Chahal v UK* (Application No.22414/93). In *Sufi and Elmi v UK* (Application No. 8319/07) [2012] 54 EHRR 9 the ECtHR went further and held that the applicants could not be removed to Somalia because of the general situation there:

    "In conclusion, the Court considers that the situation of general violence in Mogadishu is sufficiently intense to enable it to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection".

78. Obtaining reliable assurances and post-removal monitoring, to ensure that a person will not suffer treatment contrary to Article 3 if removed, can be difficult to ascertain in practice.

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

Remedial Orders

79. There is no requirement under the HRA for Parliament to be notified when an adverse judgment is received against the UK from the ECtHR, or a declaration of incompatibility is made by a domestic court. However, in the latter case relevant departmental officials notify the JCHR as a matter of course. If a remedial order is proposed to address any incompatibility, then the JCHR has certain responsibilities to consider and report on the proposals. The Government also submits an annual report to Parliament containing details of all declarations of incompatibility and adverse judgments from the ECtHR and the Government's response to these.